BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES L. SMITH Claimant	)	
VS.	)	
SNODGRASS & SONS CONSTRUCTION CO. Respondent	)	Docket No. 1,017,415
AND	)	
BUILDERS' ASSOCIATION SELF INS. FUND Insurance Carrier	)	

ORDER

Claimant requested review of the May 2, 2006 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on August 18, 2006 in Wichita, Kansas.

APPEARANCES

Garry L. Howard, of Wichita, Kansas, appeared for the claimant. Wade A. Dorothy, of Lenexa, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 21 percent permanent partial impairment to his lower right leg for an injury suffered on May 2, 2003 based upon the testimony and opinions expressed by Dr. Pat Do, the independent medical examiner. In doing so, the ALJ rejected the opinions expressed by Dr. Pedro Murati, who opined that

claimant's permanent impairment is not solely to his right ankle but to his left knee as well, an impairment that when combined, would result in a 10 percent permanent partial impairment to the whole body.

The ALJ also granted claimant temporary total disability (TTD) benefits from April 21 to June 1, 2005, although claimant sought benefits dating back to December 14, 2004.

The claimant requests review of the ALJ's finding as to the nature and extent of his permanent impairment as well as his entitlement to the additional period of TTD. Claimant argues that his antalgic gait, a condition that is well documented in the medical records, has led to a permanent impairment in his left knee, and argues that the respondent was unable to accommodate his restrictions during the disputed period and as such, he is entitled to the additional period of TTD benefits.

Respondent contends that the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ accurately and succinctly set forth the facts and circumstances surrounding this claim and the Board adopts that statement as its own. There is no dispute that claimant sustained a compensable injury on May 6, 2003 to his right ankle. The nature and extent of his injury and resulting impairment are, however, at the center of this dispute.

Two physicians have testified in this matter, Dr. Pedro Murati and Dr. Pat Do, and both addressed the issue of permanency. Each physician had access to claimant's relevant medical records from Drs. Cusic, Fanning, Siwek and Nelson, the physicians who had treated claimant following his work injury.[1] These records indicate that claimant had a serious right ankle fracture that did not heal as quickly as anticipated, and that he has had ongoing complaints of pain to that ankle and consistently demonstrated an antalgic gait. Claimant's recovery was complicated by the fact that he has diabetes and because he had some difficulty cooperating with his physicians. In fact, he was discharged from care by two physicians based upon written and verbal threats.

These same records indicate claimant was released to return to work with certain restrictions as of December 14, 2004 and thereafter, none of the physicians who were treating or evaluating his condition addressed the issue until April 20, 2005. As of April 20,

[1] Some of the records generated by these physicians have been included in the record pursuant to the parties' stipulation.

2005 surgery to remove the hardware in his right ankle was recommended and authorized, and by June 1, 2005 claimant was released to return to work.

Although the antalgic gait is consistently noted in the records by the physicians, there are no left knee complaints until April 20, 2005 when claimant is examined by Dr. Nelson, in connection with an evaluation to determine whether the hardware in his right ankle should be removed. No treatment recommendations were made at that time relative to the left knee.

At his lawyer's request, Dr. Pedro Murati examined claimant on June 13, 2005. During the examination claimant voiced complaints involving not just his right ankle, but his left knee and ankle as well. Dr. Murati diagnosed right ankle pain secondary to a fracture with resulting antalgia along with left knee pain secondary to overuse injury with meniscal involvement. He also diagnosed left knee patellofemoral syndrome and left ankle sprain due to overuse.[2]

Dr. Murati assigned a permanent impairment rating of 5 percent to the left knee for the left patellofemoral syndrome; 15 percent to the right lower extremity for loss of joint space of the right ankle; and 5 percent impairment to the right lower extremity for loss of sensory in the right foot. These impairments convert and combine for a 10 percent whole person impairment and are, according to Dr. Murati, all attributable to the work-related accident.[3]

Dr. Murati was not concerned about the delayed onset of claimant's left lower extremity complaints. While he admitted that claimant's first complaint of left lower extremity pain occurred on April 20, 2005, nearly 2 years following the accident, he testified that absent another injury, claimant's explanation that he was "favoring" his right side and thus, increasing the weight on his left side, was reasonable.[4]

When the parties could not agree upon a functional impairment rating, claimant was referred by the ALJ to Dr. Pat Do for an Independent Medical Examination which was completed on October 25, 2005. According to Dr. Do and his office records, claimant voiced complaints of pain in his lateral and medial ankle region only. Dr. Do diagnosed the claimant with status post right ankle open reduction with residual pain and stiffness, and opined that this diagnosis is the result of claimant's May 5, 2003 injury. He assigned a 21

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[2] Murati Depo. at 9.

[3] *Id.*, Ex. 2 at 3 (IME Report).

[4] *Id.* at 17.

percent impairment to the right lower extremity for loss of range of motion of the right ankle.[5]

Dr. Do conceded that it is "possible" that claimant made complaints about other parts of his body but admittedly, he does not recall making such an inquiry and there is no other reference in the file to any such complaints. On the intake sheet claimant indicated only that he was complaining of his right ankle. Nonetheless, Dr. Do testified that because he did not examine the claimant's left lower extremity he cannot say whether or not there is an impairment.[6]

The ALJ considered the testimony of Drs. Murati and Do, as well as the records of the other physicians included within the record and elected to adopt the opinions expressed by Dr. Do, the Independent Medical Examiner. In doing so, the ALJ implicitly rejected claimant's contention that the left knee impairment offered by Dr. Murati was causally related to his work-related injury.

At oral argument, claimant's counsel conceded that claimant's impairments were to his right ankle and left knee only. Respondent takes no issue with the compensability of the right ankle injury and in fact, argues that the 21 percent permanent partial impairment to the ankle awarded by the ALJ should be affirmed.

The Board has considered the record as a whole and finds the ALJ's Award should be modified to include permanency for the left knee. It is clear from this record that claimant favored his right ankle following his injury and as a result, he developed an altered gait. Dr. Do admittedly did not examine claimant's left knee and thus he has no opinion as to whether there is permanency in that part of claimant's body. And even he agrees that it is medically possible that one who has a fractured right ankle would develop left knee complaints as a result of an altered gait. Thus, the only physician to have addressed the extent of the left knee impairment is Dr. Murati. Accordingly, the Board adopts the impairment ratings rendered by Dr. Murati as to both the right ankle (20 percent) and the left knee (5 percent), and the Award is so modified to reflect this finding.

Because the claimant alleges an impairment to bilateral extremities, an issue arises as to whether claimant's permanent impairment is to be considered as two scheduled injuries or an unscheduled injury, resulting in a body as a whole impairment.[7] This is an issue that both the Board and the appellate courts have continued to grapple with in recent years.

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[5] Do Depo., Ex. 2 at 2 (Oct. 25, 2005 IME).

[6] *Id.* at 13.

[7] Because the ALJ concluded claimant sustained only a right ankle fracture, the ALJ did not have to address this issue.

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled part of the body and permanent partial general disability.[8] "[W]hen a specific injury and disability is a scheduled injury under the Workmen's Compensation Act, the benefits provided under the schedule are exclusive of any other compensation."[9] K.S.A. 44-510c(a)(2) has been extended by case law to allow compensation for certain combination injuries to be based on permanent partial disability.[10]

In *Murphy,*[11] the Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. "Where a claimant's hands and arms are simultaneously aggravated, resulting in work-related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e."[12]

In *Honn,* the Supreme Court noted that the schedule of injuries found at R.S. Supp. 1930, 44-510(3)(c)(1) to (20) failed "to provide compensation for both members when they are in pairs."[13] The court then analogized to the permanent total disability statute and concluded that "when two feet are injured, as in the case before us, the compensation should not be computed for each one separately, as for the injury to one foot as provided by the schedule, but should be computed [as a body as a whole injury]."[14] K.S.A. 44-510c(a)(2) has been amended since *Honn* and now provides, in relevant part, "[l]oss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability."

In *Pruter,*[15] the Kansas Supreme Court reaffirmed the applicability of the *Honn* exception to the loss of use of parallel limbs, at least those resulting in "substantial"

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[8] *See* K.S.A. 44-510d; K.S.A. 44-510e.

[9] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 545, 506 P.2d 1175 (1973).

[10] *See Hardman v. City of Iola*, 219 Kan. 840, 844, 549 P.2d 1013 (1976); *Downes v. IBP, Inc.*,10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[11] *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986)

[12] *Id.* at 145; *see also Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, Syl. ¶ 1, 947 P.2d 1 (1997).

[13] *Honn v. Elliott*, 132 Kan. 454, 458, 295 Pac. 719 (1931).

[14] *Id.*

[15] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

impairments. Then in *Mathena,*[16] the Court of Appeals indicated that *Pruter* says the *Honn* exception was only applicable to the loss of use of a matched pair of body parts or joints where simultaneous injuries caused substantial impairment.

In applying this line of cases to the instant set of facts, the majority of the Board concludes that claimant's injuries, one to the right ankle and the other to the left knee, must be compensated based upon the statutory schedule set forth at K.S.A. 44-510d. Thus, the Award is modified to reflect two separate scheduled impairments; a 5 percent to the left knee and a 20 percent permanent partial impairment to the right ankle.

As for the TTD issue, the Board affirms the ALJ's finding on that issue as well. Claimant's ongoing lack of compliance (as well as his uncooperative nature) has hampered the progression of this case. Claimant should not be rewarded for his conduct and the resulting delay in his treatment which was solely attributable to his own actions.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated May 2, 2006, is affirmed in part and modified in part, as follows:

The claimant is entitled to 61.43 weeks of temporary total disability compensation at the rate of $306.68 per week in the amount of $18,839.35 followed by 25.71 weeks of permanent partial disability compensation, at the rate of $306.68 per week, in the amount of $7,884.74 for a 20 percent loss of use of the lower leg, making a total award of $26,724.09.

The claimant is entitled to 10.00 weeks of permanent partial disability compensation, at the rate of $306.68 per week, in the amount of $3,066.80 for a 5 percent loss of use of the leg, making a total award of $3,066.80.

The balance of the ALJ's Award is hereby affirmed to the extent it is not inconsistent with the findings and orders made herein.

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[16] *Mathena v. IBP, Inc.,* 33 Kan. App. 2d 956, 111 P. 3d 1068 (2005).

IT IS SO ORDERED.

Dated this _____ day of September, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

The undersigned Board Members respectfully dissent from the majority's opinion. When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[17]

In this case claimant injured his right ankle and as a direct result of that injury, he developed an antalgic gait from the right knee problems. Dr. Murati concluded the left knee impairment was caused by overuse or cumulative trauma from favoring the right side. The left knee worsening was a natural and probable consequence of the right knee injury. These facts make this claim distinguishable from the *Mathena* line of analysis (which was a 2 to 1 decision) and would then allow claimant's compensation to be computed based upon a whole body impairment, rather than as two separate schedules. And *Pruter* does not require that a matching pair of body parts be injured before the disability computation moves from K.S.A. 44-510d, the scheduled injury statute, to K.S.A. 44-510e. In the noteworthy words of Judge Johnson:

[17] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

One would perceive that it makes scant difference to Mathena that she cannot perform work with her right arm because of an elbow injury and cannot perform work with her left arm due to a shoulder injury. The bottom line is that she has lost the use of both *arms*.[18]

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BOARD MEMBER

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BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier

[18] *Mathena v. IBP, Inc.,* 33 Kan. App. 2d 956, 111 P. 3d 1068 (2005).